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Supreme Court, U.S.
FILED
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(1)

No.

In the
Supreme Court of the United States

KIRK PRITCHARD,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Immigration & Naturalization Service deprives a lawful permanent resident alien of his due process rights when, in ruling that the alien is removable from this country for having been convicted of two crimes involving moral turpitude, it fails to determine whether one of those convictions should be waived pursuant to former Section 212(c) of the Immigration & Nationality Act of 1952 and this Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001).

LIST OF ALL PARTIES

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were Kirk David Pritchard, the petitioner herein, and the Immigration and Naturalization Service ("INS"), the respondent herein.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF ALL PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	4
Legal Background	4
Factual Background	5
A. The IJ Twice Orders Mr. Pritchard Removable, and the BIA Twice Reverses Him	6
B. For a Third Time, the IJ Orders Mr. Pritchard Removable	7
Jurisdiction Below and the Decision Below	8
A. The Court of Appeals Affirms the IJ's Erroneous Decision	8
REASONS FOR GRANTING THE WRIT	9
THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *INS V. ST. CYR*, 533 U.S. 289 (2001)	9

This Court's Decision in *INS v. St. Cyr* 9

Under *St. Cyr*, Mr. Pritchard Is Entitled to Consideration of his § 212(c) Application, and the IJ Erred in Refusing to Consider that Application 10

Recent BIA Case Law Confirms the IJ's Error Here 11

THIS CASE PRESENTS AN IMPORTANT PUBLIC POLICY ISSUE 13

MR. PRITCHARD SEEKS A STAY OF REMOVAL PENDING CONSIDERATION OF THIS PETITION FOR A WRIT OF CERTIORARI 13

CONCLUSION 15

TABLE OF AUTHORITIES

Cases:	Page(s)
In re Ezequeil Ortiz-Peres, No. A90-026-579, 2006 WL 3203617 (B.I.A. Sept. 20, 2006)....	11-12
INS v. Cardoza-Fonseca, 480 U.S. 421 (1987)	9
INS v. St. Cyr, 533 U.S. 289 (2001)	*passim*
Kenyeres v. Ashcroft, 538 U.S. 1301, 123 S. Ct. 1386 (2003)	14
Landgraf v. USI Film Prods., 511 U.S. 244 (1994)	9-10
Matter of Balderas, 20 I. & N. Dec. 389 (B.I.A. 1991)	7, 11, 12
Matter of Silva, 16 I. & N. Dec. 26, 1976 WL 32326 (B.I.A. 1976).....	3
Newton v. Rumery, 480 U.S. 386 (1987)	10
Rubin v. United States, 524 U.S. 1301, 119 S. Ct. 1 (1998)	13-14
Statutes:	
8 U.S.C. § 1103.....	8
8 U.S.C. § 1182(c).....	*passim*
8 U.S.C. § 1227(a)	1-2

8 U.S.C. § 1227(a)(2)(A)(ii) 2, 4, 7, 11

8 U.S.C. § 1229a 8

8 U.S.C. § 1252(a) 8

28 U.S.C. § 1254(1) 1

110 Stat. 1214 3

Pub. L. 109-13, 119 Stat. 231 8

Pub. L. 104-208, Div. C, Title III, § 304(b), Sept. 30, 1996, 110 Stat. 3009-597 ..... 3, 5

Other Authority:

8 C.F.R. § 1003.1(b) 8

8 C.F.R. § 1003.1(e)(4) 1, 8

Petitioner Kirk David Pritchard respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 8, 2008.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, which is unreported, appears in the Appendix hereto. (A-1 – A-5). The opinion of the Board of Immigration Appeals ("BIA"), which is unreported, also appears in the Appendix hereto. (A-7). Also unreported and included in the attached appendix is the decision by Immigration Judge ("IJ") Alan Page, issued after a hearing, which became the final decision of the INS when the BIA summarily affirmed the IJ's Order pursuant to 8 C.F.R. § 1003.1(e)(4). (A-9 – A-18).

JURISDICTION

The Court of Appeals for the Second Circuit entered judgment in this action on January 8, 2008. (A-2). The Second Circuit denied petitioner's motion for rehearing on February 11, 2008. (A-21 – A-22). This petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1227(a) of the Immigration and Nationality Act ("INA") provides:

> (a) Classes of deportable aliens
>
> Any alien (including an alien crewman) in and admitted to the United States shall, upon order of the Attorney General, be removed if the alien

is within one or more of the following classes of deportable aliens . . . .

8 U.S.C. § 1227(a).

Section 1227(a)(2)(A)(ii) of the INA provides:

(2) Criminal Offenses

(A) General Crimes

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of ***two or more crimes*** involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

8 U.S.C. § 1227(a)(2)(A)(ii) (emphasis added).

Former Section 212(c) of the INA provided:

(c) Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection

> shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

8 U.S.C. § 1182(c). This provision thus granted the Attorney General broad discretion to "waive" certain grounds of removability, including criminal convictions. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 295 (2001). And, though former Section 212(c) by its terms only refers to exclusion proceedings, over time it has consistently been interpreted to apply to deportation proceedings as well. *See id.* (citing *Matter of Silva*, 16 I. & N. Dec. 26, 30, 1976 WL 32326 (B.I.A. 1976)).

Section 212(c) was repealed in part by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), enacted on April 24, 1996, 110 Stat. 1214, and repealed in full by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), enacted on September 30, 1996. Pub. L. 104-208, Div. C, Title III, § 304(b), Sept. 30, 1996, 110 Stat. 3009-597.

STATEMENT OF THE CASE

Petitioner, Kirk David Pritchard, a native of Trinidad & Tobago, has been a lawful permanent resident in the United States since being brought here as a child in 1973. Mr. Pritchard seeks review of a Second Circuit ruling that denied his request to overturn a BIA decision ordering his deportation based on his conviction of two crimes involving moral turpitude.

The Second Circuit refused to consider Mr. Pritchard's argument that he had a due process right to consideration of his request for a waiver of his 1982 grand larceny conviction, one of the two convictions that made him eligible for deportation. (A-3 – A-5). Mr. Pritchard timely petitioned the Second Circuit for rehearing, noting that he had, in fact, raised due process issues under this Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), but the Second Circuit denied his petition. (A-21 – A-22).

For reasons explained below, Mr. Pritchard believes the lower court should have recognized his due process claim, considered it on its merits, and overturned the BIA's decision. He urges this Court to grant a writ of certiorari and overturn the lower court's decision.

Legal Background

Conviction of two or more crimes involving moral turpitude ("CIMTs") is grounds for removability under the INA. 8 U.S.C. § 1227(a)(2)(A)(ii). Before 1996, however, a lawful permanent resident who, like Mr. Pritchard, was in the United States for more than seven years could apply for a waiver of a ground of removability – known as a § 212(c) waiver because

it was based on § 212(c) of the INA – and thus avoid deportation. *See* 8 U.S.C. § 1182(c), repealed by IIRIRA, Pub. L. 104-208, Div. C, Title III, § 304(b), Sept. 30, 1996, 110 Stat. 3009-597.

As this Court noted in *INS v. St. Cyr*, 533 U.S. 289 (2001), such waivers frequently were granted. *St. Cyr*, 533 U.S. at 296 & n.5. As this Court also noted in *St. Cyr*, lawful permanent residents who, like Mr. Pritchard, pleaded guilty to a crime before IIRIRA's repeal of § 212(c) have a due process right to have their § 212(c) waiver considered because, if such a resident alien is deprived of that consideration, then IIRIRA's repeal of § 212(c) has an impermissible retroactive effect. *See generally St. Cyr*, 533 U.S. at 314-326; *see id.* at 326 ("We therefore hold that § 212(c) relief remains available for aliens, like respondent, whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect.").

Factual Background

Mr. Pritchard is a 46-year-old citizen of Trinidad and Tobago. He was admitted into the United States at New York City, New York on March 20, 1973 as a lawful permanent resident and has remained in this country ever since. Mr. Pritchard served as a medic in the United States Military Reserve from 1979 until honorably discharged in 1986.

On or about February 5, 1982, Mr. Pritchard pleaded guilty to second degree grand larceny. Mr. Pritchard received a sentence of five years probation, which he served satisfactorily. On or about October 20, 1995, Mr. Pritchard pleaded

guilty to the felony of attempted criminal sale of a controlled substance in the third degree. Mr. Pritchard was again sentenced to five years probation.

In April 1998, Mr. Pritchard pleaded guilty to the misdemeanor of petty larceny for stealing merchandise valued at approximately $124.33 from a JC Penney store. He was sentenced to six months in jail.

A. The IJ Twice Orders Mr. Pritchard Removable, and the BIA Twice Reverses Him

In November 1999, the INS charged that Mr. Pritchard was removable from the United States based solely on his 1995 conviction for attempted sale of a controlled substance. In a hearing on July 17, 2000, an IJ concluded that Mr. Pritchard was removable and, in a later oral decision, ordered Mr. Pritchard removed to Trinidad and Tobago, denying Mr. Pritchard's request for § 212(c) relief in the process.

In a decision dated February 1, 2001, the BIA reversed, on the grounds that Mr. Pritchard had pleaded guilty to his 1995 conviction before the repeal of § 212(c). The BIA thus remanded the case to the IJ to consider Mr. Pritchard's § 212(c) application.

On June 1, 2001, on remand from the BIA, the IJ again ordered Mr. Pritchard removed and again refused to consider Mr. Pritchard's § 212(c) application for a waiver of his 1995 conviction. Although the INS did not file additional charges, the IJ on his own observed that Mr. Pritchard

had two convictions for CIMTs – his 1982 grand larceny conviction and his 1998 petty larceny conviction – rendering him removable pursuant to § 237(a)(2)(A)(ii) of the INA. 8 U.S.C. § 1227(a)(2)(A)(ii). The IJ noted that, because Mr. Pritchard's 1998 petty larceny conviction occurred after § 212(c) was repealed, a § 212(c) waiver could not waive Mr. Pritchard's removability for conviction of two CIMTs, citing the BIA's decision in *Matter of Balderas*, 20 I. & N. Dec. 389 (B.I.A. 1991).

On April 3, 2002, the BIA again reversed and remanded, holding that the IJ should not have used the 1982 and 1998 convictions as grounds for removal because the INS had not raised them.

B. For a Third Time, the IJ Orders Mr. Pritchard Removable

Mr. Pritchard's removal hearing resumed on October 2, 2002. At that time, the INS served Mr. Pritchard, who proceeded *pro se*, with an additional charge of removability, for the first time alleging that Mr. Pritchard was removable based on his 1982 and 1998 CIMT convictions. In an oral decision on April 7, 2003 (the "April 2003 Order"), the IJ again ordered Mr. Pritchard's removal, holding that there was no relief available that could waive all the grounds of removability. (A-12 – A-18).

The IJ concluded, presumably relying on *Balderas* again, that § 212(c) was not available to waive Mr. Pritchard's two CIMTs, because Mr. Pritchard's 1998 conviction postdated the repeal of § 212(c) and the facts of Mr. Pritchard's 1982 conviction could still be alleged as a CIMT even if waived. The IJ therefore concluded that it would be "futile to address [Mr. Pritchard's § 212(c)] application on the merits." In a

decision dated November 18, 2003, the BIA summarily affirmed the IJ's April 2003 Order pursuant to 8 C.F.R. § 1003.1(e)(4). (A-7).

Jurisdiction Below and the Decision Below

Jurisdiction in the court of appeals was appropriate pursuant to 8 U.S.C. § 1252(a) and Section 106(c) of the REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231, because Mr. Pritchard's claim was a habeas petition for review concerning a final decision of the INS issued after a hearing to which Mr. Pritchard was a party, and Mr. Pritchard resided within the Second Circuit Court of Appeals. Jurisdiction in the administrative tribunal was proper pursuant to 8 U.S.C. §§ 1103 and 1229a and 8 C.F.R. § 1003.1(b).

A. The Court of Appeals Affirms the IJ's Erroneous Decision

In a January 8, 2008 decision, the Second Circuit Court of Appeals affirmed the BIA's ruling, finding that Mr. Pritchard had "no right to due process when [the INS] refused to consider on its merits his application for section 212(c) relief." (A-4). Despite both parties' briefing of the due process issue with repeated citation to this Court's decision in *St. Cyr*, the Second Circuit did not decide whether depriving Mr. Pritchard of § 212(c) consideration for his 1982 grand larceny conviction was impermissibly retroactive under *St. Cyr*. (A-4 – A-5).

REASONS FOR GRANTING THE WRIT

This Court should grant the requested writ for two reasons: (1) the decision below conflicts with this Court's ruling in *INS v. St. Cyr*, 533 U.S. 289 (2001) and has broad implications for the future use of § 212(c) waivers in immigration proceedings based on conviction of two or more CIMTs; and (2) the issue is one of grave importance to the potential class of resident aliens affected.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *INS V. ST. CYR*, 533 U.S. 289 (2001)

The decision below conflicts with this Court's decision in *INS v. St. Cyr* and has serious ramifications for cases, like this one, where an alien is entitled to consideration of his § 212(c) waiver application, yet the INS fails to provide the alien with this basic due process. *INS v. St. Cyr*, 533 U.S. 289, 325-26 (2001). There is a "longstanding principle of construing any lingering ambiguities . . . in favor of the alien," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987), and this case is no exception: this Court's ruling in *St. Cyr* clearly provides a due process right to consideration of a § 212(c) waiver in cases like this one. Because the lower court's decision conflicts with that prior ruling, it must be reversed. *St. Cyr*, 533 U.S. at 325-26.

This Court's Decision in *INS v. St. Cyr*

In *St. Cyr*, this Court held that a retroactive application of IIRIRA's repeal of § 212(c) would be contrary to "'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" 533 U.S. at 323 (quoting *Landgraf v. USI Film Prods.*,

511 U.S. 244, 270 (1994)). The Court relied heavily on the fact that "[p]lea agreements involve a quid pro quo between a criminal defendant and the government." *Id.* at 321. By entering into a plea agreement, an alien-defendant surrenders important constitutional rights (such as a trial by jury) in anticipation of, among other things, receiving a sentence that preserves his eligibility for § 212(c) relief (i.e., a sentence of less than five years), while the government receives the benefit of "'promptly imposed punishment without the expenditure of prosecutorial resources.'" *Id.* at 321-23 (quoting *Newton v. Rumery*, 480 U.S. 386, 393 n. 3 (1987)).

This "quid pro quo" meant that, to apply IIRIRA's repeal of § 212(c) relief to aliens who had before that repeal pleaded guilty to a crime – in part relying on the availability of § 212(c) relief – would "retroactively unsettle their reliance on the state of law at the time of their plea agreement." *St. Cyr*, 533 U.S. at 325. Because of this impermissible retroactive effect, this Court held that "§ 212(c) relief remains available for aliens, like respondent [and Mr. Pritchard], whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." *Id.* at 326.

Under *St. Cyr*, Mr. Pritchard Is Entitled to Consideration of his § 212(c) Application, and the IJ Erred in Refusing to Consider that Application

Under this Court's decision in *St. Cyr*, Mr. Pritchard has a due process right to consideration of his § 212(c) petition based on the fact that he was a permanent United States resident, who, in 1982 –

before repeal of § 212(c) – pleaded guilty to a crime that made him deportable. *See id.* at 315. Nonetheless, in the immigration proceedings below, the IJ refused to consider Mr. Pritchard's § 212(c) application on its merits, deeming it "futile." (A-10, A-17 – A-18). This was clear error: The INS could not have deported Mr. Pritchard without ***both*** his 1982 and 1998 convictions, since the basis for his removal was his conviction of ***two CIMTs***. *See* 8 U.S.C. § 1227(a)(2)(A)(ii) (requiring that an alien be convicted of two crimes of moral turpitude before he may be deported).

Recent BIA Case Law Confirms the IJ's Error Here

The BIA's decision in *Matter of Balderas*, 20 I. & N. Dec. 389 (B.I.A. 1991) does not impact the availability of § 212(c) relief here; indeed, recent BIA case law confirms that *Balderas* is inapplicable and that the IJ erred below.

In *Balderas*, the BIA merely held that waiver of a conviction as a ground of removability under § 212(c) does not expunge that conviction from the alien's record, and the conviction may therefore be relied on in ***later*** immigration proceedings. *Id.* at 392-93. *Balderas* thus has no impact on whether an alien is entitled to § 212(c) consideration – *St. Cyr* alone determines that – rather, *Balderas* simply grants the INS discretion to rely, in a later proceeding, on a conviction once waived under § 212(c), even though the INS could not rely on such a conviction in the same proceeding in which the § 212(c) waiver was granted.

The BIA's recent decision in *In re Ezequeil Ortiz-Peres* recognizes this distinction and confirms that Mr. Pritchard was entitled to consideration of his

§ 212(c) petition here. No. A90-026-579, 2006 WL 3203617 (B.I.A. Sept. 20, 2006). There, Mr. Ortiz-Peres (like Mr. Pritchard) was an alien with two CIMT convictions, one a 1993 assault conviction that predated the repeal of § 212(c), the other a 2006 conviction for making criminal threats that followed that repeal. *Id.* During the deportation proceedings, the IJ pretermitted Mr. Ortiz-Peres's application for § 212(c) relief as to the 1993 assault conviction, concluding that his 2006 conviction precluded any relief under § 212(c) because that conviction occurred after the repeal of § 212(c). *Id.* The BIA reversed the IJ's decision, finding that Mr. Ortiz-Peres's deportation "charge – founded as it is upon two [CIMTs] – would cease to be viable if [he] were granted a section 212(c) waiver with respect to *either* predicate crime." *Id.* (emphasis in original). Because Mr. Ortiz-Peres might receive a § 212(c) waiver of his 1993 conviction, and a waiver of that conviction would cease to render him removable for two CIMTs, the BIA eschewed the dissent's reliance on *Balderas*, *supra*, reversed the IJ's decision, and remanded the case for consideration of Mr. Ortiz-Peres's § 212(c) application. *Id.*

As *In re Ezequeil Ortiz-Peres* makes clear, the IJ clearly erred in determining that Mr. Pritchard was not entitled to consideration of his § 212(c) petition on its merits, because the IJ could not waive Mr. Pritchard's 1982 CIMT and, at the same time and in the same proceeding, apply *Balderas* and remove Mr. Pritchard for two CIMTs. No. A90-026-579, 2006 WL 3203617 (B.I.A. Sept. 20, 2006). As a result, Mr. Pritchard is entitled to reversal of the Second Circuit's decision, and a remand to the IJ for consideration of his § 212(c) petition on its merits, as required under this Court's decision in *St. Cyr*.

THIS CASE PRESENTS AN IMPORTANT PUBLIC POLICY ISSUE

Exercise of this Court's review here is necessary to prevent an absurd outcome – the denial of § 212(c) relief to individuals who are plainly entitled to consideration of such applications under this Court's decision in *INS v. St. Cyr*. For those affected, this is a matter of grave importance and manifest unfairness.

Mr. Pritchard urges this Court to grant certiorari and correct the injustice done to him and to others similarly situated.

MR. PRITCHARD SEEKS A STAY OF REMOVAL PENDING CONSIDERATION OF THIS PETITION FOR A WRIT OF CERTIORARI

This Court should also grant Mr. Pritchard a stay of removal pending consideration of his petition for a writ of certiorari. Mr. Pritchard sought this relief from the Second Circuit Court of Appeals, which stated that it could not consider his application because it considered his case closed. Mr. Pritchard is entitled to a stay of removal pending consideration of his petition for a writ of certiorari because: (i) he will suffer irreparable harm without a stay, as the INS may deport him at any time; (ii) as noted above, Mr. Pritchard's claim is sufficiently meritorious to create a reasonable probability that four Members of this Court will vote to grant certiorari in this case; and (iii) it is likely that this Court, having granted certiorari, will reverse the Second Circuit's judgment because, as also noted above, that judgment clearly conflicts with this Court's decision in *St. Cyr. Rubin v. United States*, 524 U.S. 1301, 1302, 119 S. Ct. 1, 2

(1998) (Rehnquist, C.J., as Circuit Justice); *Kenyeres v. Ashcroft*, 538 U.S. 1301, 1306-07, 123 S. Ct. 1386, 1388 (2003) (Kennedy, J., as Circuit Justice).

CONCLUSION

For these reasons, Mr. Pritchard should be granted a stay of removal, and a writ of certiorari should issue to review the judgment and opinion of the Second Circuit Court of Appeals.

Dated: April 25, 2008

Respectfully submitted,

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APPENDIX

No. 05-6167-ag
Pritchard v. INS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 8th day of January, two thousand and eight.

PRESENT:

HON. GUIDO CALABRESI,
HON. JOSÉ A. CABRANES,
HON. SONIA SOTOMAYOR,
Circuit Judges.

UNITED STATES COURT OF APPEALS
FILED
JAN -8 2008
Catherine O'Hagan Wolfe, Clerk
SECOND CIRCUIT

KIRK PRITCHARD,

Petitioner,

v.

A31-397-362
No: 05-6167-ag

IMMIGRATION AND
NATURALIZATION SERVICE,

Respondent.

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FOR RESPONDENT:

ANDREW M. McNEELA, Assistant United States Attorney (Kathy S. Marks, Assistant United States Attorney, *on the brief*), *for* Michael J. Garcia, United States Attorney for the Southern District of New York, New York, N.Y.

UPON DUE CONSIDERATION of this petition for review of a decision of the Board of Immigration Appeals ("BIN"), it is hereby **ORDERED, ADJUDGED,** and **DECREED** that the petition is **DENIED**, and that petitioner's motion for a stay of deportation is **DISMISSED** as moot.

Petitioner Kirk Pritchard, a native and citizen of Trinidad and Tobago, seeks review of a November 18, 2003 decision of the Board of Immigration Appeals ("BIA"), which summarily affirmed an April 7, 2003 decision of Immigration Judge ("IJ") Alan Page, ordering Pritchard removed from the United States. *In re Kirk David Pritchard*, No. A31-397-362 (B.I.A. Nov. 18, 2004), *aff'g* No. A31-397-362 (Immig. Ct. N.Y. City, Apr. 7, 2003). The IJ pretermitted as futile Pritchard's application for a waiver of deportation under former section 212(c) of the Immigration and Nationality Act ("INA"), holding that this form of relief was not available to Pritchard in light of the provision's repeal in 1996. We assume the parties' familiarity with the facts of the case and its procedural history.

Before us, Pritchard first presses procedural objections to the order of removal. He notes that the government initially alleged that he was deportable on two grounds, but that he was ultimately ordered

removed on a third ground, with which he was first charged over three years after the Notice to Appear, after the case had been twice up to and down from the BIA. Relying on these facts, Pritchard contends that the government should be barred by equitable estoppel or by *res judicata* from deporting him on the third ground. Petitioner, however, failed to exhaust these issues before the agency, and we decline to consider petitioner's equitable estoppel and *res judicata* arguments.[1] *See Lin Zhong v. U.S. Dep't of Justice*, 480 F.3d 104, 121-22 (2d Cir. 2007).

Petitioner also disputes the substance of the agency's decision. Pritchard concedes that his second conviction for a crime of moral turpitude rendered him deportable under 237(a)(2)(A)(ii) of the INA. He claims, instead, that the agency violated his right to due process when it refused to consider on its merits his application for section 212(c) relief. In response, the government notes that section 212(c) was repealed in 1996, after Pritchard pleaded guilty to

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[1] We note, in passing, that petitioner's procedural arguments appear to be without merit. The applicable regulations explicitly permit the filing of additional charges "[a]t any time" after the initial proceedings have commenced. 8 C.F.R. § 1003.30. Moreover, equitable estoppel is applied against the government "only in those limited cases where the party can establish both that the government made a misrepresentation upon which the party reasonably and detrimentally relied and that the government engaged in a affirmative misconduct." *United States v. Paredes-Batista*, 140 F.3d 367, 375 (2d Cir. 1998) (quotation marks omitted). In this case, the government appears neither to have represented that it would bring no further charges, nor to have engaged in affirmative misconduct. And *res judicata* would not seem to apply where, as here, there was no final order on the merits prior to the lodging of the additional charge. *See Valencia-Alvarez* v. *Gonzales*, 469 F.3d 1319, 1331 (9th Cir. 2006).

his first crime of moral turpitude, but before he pleaded guilty to his second. The government asserts that the repeal deprives Pritchard of any entitlement to section 212(c) relief. Insofar as Pritchard claims that such deprivation violates the Due Process Clause of the Fifth Amendment, his argument lacks merit. *See, e.g., Kuhali v. Reno*, 266 F.3d 93, 111-12 (2001).

In these circumstances, petitioner's only conceivable means of challenging the agency's order would be for him to show that depriving him of section 212(c) relief would be impermissibly retroactive, so that, under *INS v. St. Cyr*, 533 U.S. 289, 322-23 (2001), we would presume that Congress did not intend the repeal to apply to his case. Pritchard, however, makes no such submission. Though petitioner's opening brief mentions *St. Cyr* in support of his "due process" argument, his reply brief makes it clear that the question of whether the repeal of § 212(c) was retroactive as applied to Mr. Pritchard" was "not raised by Mr. Pritchard" in his opening brief. Petitioner's Reply Brief at 1. Accordingly, we do not decide whether a retroactivity argument, if properly before us, would succeed. *See State St. Bank & Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 172 (2d Cir. 2004).

For the foregoing reasons, we **DENY** the petition for review. Petitioner's motion for a stay of deportation pending our review is **DISMISSED** as moot.

For the Court,

CATHERINE O'HAGAN WOLFE, Clerk of Court

by: /s/

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board
of Immigration
Appeals

File: A31-397-362 - NEW YORK Date:

In re: PRITCHARD, KIRK DAVID* NOV 18 2003

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

/s/

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
Immigration Court
201 Varick Street, Room 1140
New York, NY 10014

In the Matter of:	File No.: A 31397362
Kirk Pritchard	IN REMOVAL PROCEEDINGS
ON BEHALF OF RESPONDENT	ON BEHALF OF SERVICE
Pro Se	/s/

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the Oral Decision entered on 4/7/03. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] Respondent was ordered removed from the United States to Trinidad & Tobago.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to _____ alternative to _____.

[ ] Respondent's application for voluntary departure was granted until _____ upon posting a bond in the amount of $_____ with an alternate order of removal to _____.

[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for withholding of removal was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal under Section 240(A)(a) was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal was ( ) granted under Section 240A(b)(1) (denied) (withdrawn) ( ) granted under section 240(b)(2) ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[X] Respondent's application for a waiver under section 212(c) of the INA was ( ) granted (X) denied ( ) withdrawn or ( ) other. Futile to address on Merits

[ ] Respondent's application for adjustment of status under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $_____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____

Appeal: ( ) waived (X) reserved by: [A] || B
Due by: May 7, 2003

/s/
IMMIGRATION JUDGE

Received by resp tr 5/7/03.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
Immigration Court
New York, New York 10014

File A 31 397 362 April 7, 2003

In the Matter of

KIRK DAVID PRITCHARD,	)	IN REMOVAL PROCEEDINGS
Respondent	)	

CHARGES: Removability pursuant to Section 237(a)(2)(B)(i) of the Immigration and Nationality Act, as amended, in that at any time after admission, the respondent has been convicted of a violation of law relating to a controlled substance, to wit, crack cocaine; Section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, as amended, in that at any time after admission, the respondent has been convicted of two Crimes Involving Moral Turpitude not arising out of a single scheme of criminal misconduct.

APPLICATION:

ON BEHALF OF RESPONDENT:	ON BEHALF OF DEPARTMENT OF HOMELAND SECURITY:
Pro se	Adam Feller, Esquire Assistant District Counsel New York District

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 42-year-old unmarried male alien, who is a native of Trinidad and a citizen of Trinidad and Tobago. He was admitted into the United States at New York City, New York on March 20th 1973 as a lawful permanent resident. The respondent remains in that status as of the present time.

The respondent was convicted of the crime of attempted criminal sale of a controlled substance in the third degree, the drug involved being crack cocaine, in violation of the New York State Penal Law pursuant to a judgment entered on or about September 30th 1995 in the Supreme Court in the State of New York, County of Kings under indictment 10747/1995. See Exhibit RR4 relating to the convictions; see Exhibit RR1, document 3, relating to the respondent's admission as a lawful permanent resident.

On February 5th 1982, the respondent was convicted in the Supreme Court in the State of New York, County of Kings of the offense of grand larceny

in the second degree in violation of section 155.35 of the New York State Penal Law. See Exhibit RR1, number 6.

On April 22nd 1998, the respondent was convicted in the 1st District Court, Nassau County, State of New York for the offense of petty larceny in violation of Section 155.25. See Exhibit RR3.

The respondent initially appeared before this Court on October 2nd 2002 regarding the remand. On that occasion, he was unrepresented. He was advised of his right to counsel, and the matter was adjourned to November 27th 2002 for the respondent to obtain counsel. It was on that date, October 2nd 2002, that the Service submitted in I-261, see Exhibit RR2, as well as a conviction record in support of at least one of the allegations on that I-261, see Exhibit RR3.

When the respondent appeared on November 27th 2002, he indicated that he had an appointment with the Legal Aid Society on December 11th 2002. The Court adjourned the case to February 3rd 2003 to give the respondent an opportunity to consult with the Legal Aid Society, and to give him more time to obtain counsel.

When the respondent appeared on February 3rd of 2003, he was still unrepresented. He indicated he still was attempting to obtain counsel. The Court adjourned the matter one more time to April 7th 2003 to give the respondent every opportunity to obtain counsel. The respondent was told at the close of the hearing on February 3rd 2003, that if he did not have counsel on April 7th 2003, the Court would go ahead, and the respondent would have to represent himself.

The pleadings on the original Notice to Appear were taken back on July 17th 2000. The respondent admitted the truth of the four factual allegations on the Notice to Appear dated November 30th 1999. The Court found that he was deportable pursuant to both charges that were lodged on the NTA, to wit, Section 237(a)(2)(B)(i) of the Act, in that he had been convicted of a drug offense involving a controlled substance, to wit, cocaine. The Court also found that the respondent had been convicted of an aggravated felony offense. In fact, the respondent conceded that through counsel. In any event, there was no question that his conviction for the attempted criminal sale of a controled substance in the third degree involving crack cocaine was an aggravated felony, a drug trafficking offense, and it fell within the meaning of Section 101(a)(43)(B).

When the respondent appeared on April 7th 2003, he was still unrepresented. The Court went ahead and took the pleadings with reference to the I-261, which had been marked into the record as Exhibit RR2. The respondent admitted the truth of allegations 5 and 6 on the I-261. With reference to allegation 5, the record contained a conviction regarding grand larceny in the second degree, that was part of Exhibit RR1, number 6. The respondent conceded that record related to him. With reference to the petty larceny conviction on April 22nd 1998, the respondent conceded that Exhibit RR3, a certifcate of disposition in the name of Shon Ellington related to the respondent.

The respondent indicated that if he had to be removed, he wished to designate Trinidad and Tobago. With reference to any application for relief, the respondent was under the impression that his

petty larceny conviction on April 22nd 1998 was a misdemeanor, and that he could not be sentenced to at least a year in jail, or as much as a year in jail. Therefore, he did not believe that he was removable pursuant to Section 237(a)(2)(A)(ii) of the Act. The Court checked the New York State Penal Law, and section 70.15 indicates that if one is convicted of a class A misdemeanor, he can be sentenced to a sentence of imprisonment not to exceed one year. The Court believes that the respondent has been convicted of two Crimes Involving Moral Turpitude, to wit, grand larceny in the second degree in 1982 and petty larceny in 1998. The Court also believes that those two crimes are totally unrelated and did not arise out of a single scheme of criminal misconduct. Therefore, the Court found that the respondent was removable pursuant to Section 237(a)(2)(A)(ii) of the Act, in that at any time after admission, he was convicted of two Crimes Involving Moral Turpitude not arising out of a single scheme of criminal misconduct.

With reference to relief, the Court believes that the respondent is still eligible for Section 212(c) relief, and he can use that remedy or application to waive any grounds of inadmissibility or removability that arose as a result of convictions on or before April 24th 1996. Therefore, based upon the rap sheet, Exhibit RR4, there are any number of offenses or grounds of inadmissibility that 212(c) will waive. The respondent falls within the ambit of INS v. St. Cyr, 121 S.C.t. (2271) (2001) because it appears that all of those convictions were the result of pleas that he had taken. He did not go to trial regarding any of those convictions. However, with reference to the ground of inadmissibility that arose as a result of his 1998 petty larceny conviction, I do not believe that there is

any remedy available to the respondent to address that ground of removability for the following reasons. 212(c) was repealed upon the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Therefore, it cannot be used to cure the ground of removability that came about as a result of his petty larceny conviction on April 22nd 1998.

The respondent might argue that he could seek section 212(c) to cure all grounds of removability as a result of convictions on or before April 24th 1996, and then use cancellation of removal pursuant to Section 240A(a) to address the ground of removability pursuant to Section 237 (a)(2)(A)(ii). However, the respondent has been convicted of an aggravated felony. This Court believes that as a result of the aggravated felony conviction, to wit, attempted criminal sale of a controlled substance in the third degree, as a matter of law, he is ineligible for cancellation of removal. Nor does the Court believe he could seek adjustment of status in conjunction with any other form of relief. He clearly needs a 212(h) waiver in order to be granted adjustment of status, and the Court does not believe he can be granted a 212(h) waiver because he has been convicted of an aggravated felony at any time after he became a lawful permanent resident.

It appears to this Court that although the respondent can apply for Section 212(c) relief, it would be futile to address the application on the merits because it does not appear that there is any relief available to him with reference to the charge pursuant to 237(a)(2)(A)(ii), which comes about as a result of his April 22nd 1998 petty larceny conviction.

The following order will be entered.

ORDER

IT IS ORDERED that the respondent's application for Section 212(c) relief be deemed futile and therefore, not addressed on the merits.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Trinidad and Tobago pursuant to the charges contained in the Notice to Appear, and on the I-261.

/s/ Alan Page
ALAN PAGE
Immigration Judge

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board
of Immigration
Appeals

Falls Church, Virginia 22041

File: A31 397 362 - NEW YORK

Date:
MAR 30 2005

In re: KIRK DAVID PRITCHARD

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Reopening

The respondent moves to reopen and remand his case to the Immigration Court to apply for a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (repealed), in accordance with the recently promulgated regulations to implement the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001).

The respondent has the burden to prove his eligibility. *See* 69 Fed. Reg. 57826, 57833 (September 28, 2004) (to be codified at 8 C.F.R. § 1003.44(b)). The respondent is not eligible to apply for a section 212(c) waiver of the petit larceny conviction pursuant to the St. Cyr regulations because he has not proven that his plea agreement to the crime, committed in violation of section 155.25 of the New York Penal Law, occurred prior to April 1, 1997 (Exh. RR3; Tr. at 22-23 (April 7, 2003)). *See* 69 Fed. Reg. 57826, 57833,

57835 (September 28, 2004) (to be codified at 8 C.F.R. §§ 1003.44(a), (b)(2); 1212.3(h)). *See Michel v. INS*, 206 F.3d 253, 265 (2nd Cir. 2000) (noting that the Board has held that the seriousness of the offense is not determinative of whether a crime involves moral turpitude); *Matter of Alarcon*, 20 I&N Dec. 557, 558-59 (BIA 1992) (finding that a California petty theft conviction constitutes a crime involving moral turpitude); *Matter of Esfandiary*, 16 I&N Dec. 659, 661 (BIA 1979) (finding that petit larceny is a crime involving moral turpitude); *Matter of S-*, 5 I&N Dec. 678, 680-81 (finding that Canadian petty theft convictions constitute crimes involving moral turpitude because they involved a permanent taking).

Furthermore, even if the respondent's earlier 1982 New York conviction for grand larceny could be waived under section 212(c) of the Act, this form of relief does not act as a pardon or expungement of the conviction. Therefore, he is removable under the lodged charge under section 237(a)(2)(A)(ii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(ii), for having been convicted of two crimes involving moral turpitude — the 1982 grand larceny conviction and the 1999 petit larceny conviction. *See Matter of Balderas*, 20 I&N Dec. 389, 393 (BIA 1991) (the Board held that a conviction which has once been relied in a charge of deportability may be alleged as one of the two crimes involving moral turpitude where the second crime is a subsequent conviction). Accordingly, we enter the following order.

Order: The motion to reopen is denied.

/s/

FOR THE BOARD

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK N.Y. 10007

Catherine O'Hagan Wolfe
CLERK OF COURT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 11th day of February two thousand eight.

Before: Hon. Guido Calabresi,
Hon. Jose A. Cabranes,
Hon. Sonia Sotomayor,
Circuit Judges.

UNITED STATES COURT OF APPEALS
FILED
FEB 11 2008
Catherine O'Hagan Wolfe, Clerk
SECOND CIRCUIT

Docket No. [s]: 05-6167 -ag

Kirk Pritchard,

Petitioner,

v.

Immigration and Naturalization Service,

Respondent.

ORDER
05-6167-ag

Petitioner Kirk Pritchard having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT HEREBY ORDERED that the petition is denied.

For the Court,

Catherine O'Hagan Wolfe, Clerk

by: /s/

Motion Staff Attorney